(1)

No. 94-3

IN THE

Supreme Court of the United States

October Term, 1994

REYNOLDSVILLE CASKET CO., *et al.*,
Petitioners,

vs.

CAROL L. HYDE,
Respondent.

ON WRIT OF CERTIORARI TO
THE SUPREME COURT OF OHIO

BRIEF FOR PETITIONERS

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QUESTION PRESENTED FOR REVIEW

Whether state courts, in refusing to retroactively apply the decision in *Bendix Autolite Corp. v. Midwesco Enterprises, Inc.*, 486 U.S. 888, 108 S.Ct. 2218, 100 L.Ed.2d 896 (1988), to civil cases pending at the time *Bendix Autolite Corp. v. Midwesco Enterprises, Inc.* was announced may properly premise their actions on the following grounds:

A. *Chevron Oil Co. v. Huson*, 404 U.S. 97, 92 S.Ct. 349, 30 L.Ed.2d 296 (1971), dictates that *Bendix Autolite Corp. v. Midwesco Enterprises, Inc.* should not be retroactively applied.

B. *Harper v. Virginia Dept. of Taxation*, 509 U.S. _____, 113 S.Ct. 2510, 125 L.Ed.2d 74 (1993), allows state courts to tailor their own remedies as they determine the manner in which a United States Supreme Court opinion is to be retroactively applied.

C. When there is a conflict between a state constitutional civil right and a federal rule of decision that is not rooted in the United States Constitution, such as retroactivity, the state civil right prevails.

LIST OF PARTIES

The Petitioners are the Reynoldsville Casket Company and John M. Blosh.

The Respondent is Carol L. Hyde.

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OPINIONS BELOW

The opinion of the Ohio Supreme Court is reported at 68 Ohio St.3d 240 (1994) and found at page A1 of the Appendix to the Petition for Writ of Certiorari. ("Pet. App.")

The opinion of the Eleventh District Court of Appeals for Ashtabula County, Ohio, was entered on July 2, 1992 and is found at Pet. App. A17.

The judgment entry of the trial court was entered on July 31, 1991 and is found at Pet. App. A27.

JURISDICTION

The opinion of the Ohio Supreme Court was entered on February 9, 1994. Petitioners' request for a rehearing was denied by the Ohio Supreme Court on April 6, 1994. This Court's jurisdiction is invoked under 28 U.S.C. §1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS AT ISSUE

U.S. Const. Article VI, Cl. 2, provides that:

> "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."

Joint Appendix p. 18.

Ohio Const., Article I, §16, provides in part that:

> "All courts shall be open, and every person, for an injury done him in his land, goods, person, or reputation, shall have remedy by due course of law, and shall have justice administered without denial or delay."

Joint Appendix p. 18.

Ohio Revised Code §2305.10, provides in part that:

> "An action for bodily injury or injuring personal property shall be brought within two years after the cause thereof arose."

Joint Appendix p. 19.

Ohio Revised Code §2305.15, provides in part that:

> "When a cause of action accrues against a person, if he is out of state, or has absconded, or conceals himself, the period of limitation for the commencement of the action as provided in sections 2305.04 to 2305.14, inclusive, and sections 1302.98 and 1304.29 of the Revised Code, does not begin to run until he comes into the state

or while he is so absconded or concealed. After the cause of action accrues if he departs from the state, or absconds or conceals himself, the time of his absence or concealment shall not be computed as any part of a period within which the action must be brought."

Joint Appendix p. 19.

Ohio Revised Code §2305.15(A), provides in part that:

"(A) When a cause of action accrues against a person, if he is out of the state, has absconded, or conceals himself, the period of limitation for the commencement of the action as provided in sections 2305.04 to 2305.14, 1302.98, and 1304.29 of the Revised Code does not begin to run until he comes into the state or while he is so absconded or concealed. After the cause of action accrues if he departs from the state, absconds, or conceals himself, the time of his absence or concealment shall not be computed as any part of a period within which the action must be brought."

Joint Appendix p. 19.

STATEMENT OF THE CASE

On March 5, 1984, John M. Blosh, while driving a truck owned by his employer, the Reynoldsville Casket Co., was involved in an auto accident with another vehicle in which Carol L. Hyde was a passenger. The accident occurred in Ashtabula County, Ohio. The Reynoldsville Casket Co., a Pennsylvania corporation, had no corporate office in Ohio, was not registered to do business in Ohio and had not appointed an agent for service of process in Ohio. John M. Blosh and Carol L. Hyde were also residents of Pennsylvania.

On August 11, 1987, Carol L. Hyde filed suit against John M. Blosh and the Reynoldsville Casket Co. claiming that John M. Blosh, while in the scope of his employment with Reynoldsville Casket Co., was negligent in the operation of Reynoldsville Casket Co.'s truck, said negligence causing bodily injury to Carol L. Hyde. On October 13, 1987, John M. Blosh and the Reynoldsville Casket Co. filed their Answer. Along with denying the allegation of negligence, John M. Blosh and the Reynoldsville Casket Co. raised the affirmative defense that Carol L. Hyde's claim was time barred by Ohio's two-year statute of limitations, O.R.C. §2305.10.

On February 8, 1988, John M. Blosh and Reynoldsville Casket Co. filed a Motion to Dismiss, pursuant to Oh. Civ. R. 12(B)(6), requesting dismissal of Carol L. Hyde's Complaint in that it was time barred by the two-year statute of limitations contained in O.R.C. §2305.10. Carol L. Hyde's response to the Motion to Dismiss was to claim that O.R.C. §2305.15, generally referred to as the Savings Clause, permitted the filing of her Complaint.

While the Motion to Dismiss was pending before the trial Court, the United States Supreme Court in *Bendix Autolite Corp. v. Midwesco Enterprises, Inc.*, 486 U.S. 888, 108 S.Ct. 2218, 100 L. Ed. 2d 896 (1988), declared that Ohio's Savings Clause, O.R.C. §2305.15, violated the Commerce Clause of the United States Constitution since it imposed an impermissible burden on interstate commerce. In *Bendix Autolite Corp. v. Midwesco Enterprises, Inc.*, the Court declined to address the argument of Bendix that if the Court found O.R.C. §2305.15 unconstitutional, the Court's ruling should be prospective only and not apply to the parties in *Bendix Autolite Corp. v. Midwesco Enterprises, Inc.*

On July 31, 1991, the trial court granted John M. Blosh's and Reynoldsville Casket Co.'s Motion to Dismiss. In dismissing the Complaint of Carol L. Hyde, the trial court applied the ruling in *Bendix Autolite Corp. v. Midwesco Enterprises, Inc.* to both Reynoldsville Casket Co. and John Blosh. Upon appeal to the Court of Appeals, the decision of the trial court was affirmed in all respects. As to the issue of prospective application, the Court of Appeals stated:

> "The general rule in Ohio is:
>
> '* * * (A) decision of a court of supreme jurisdiction overruling a former decision is retrospective in its operation, and the effect is not that the former was bad law, but that it never was the law. * * * ' *State, ex rel. Tavenner v. Indian Lake Local School Dist. Bd. of Edn.* (1991), 62 Ohio St. 3d 88, 90, quoting *Peerless Electric Co. v. Bowers* (1955), 164 Ohio St. 209, 210.' "

Pet. App. A24.

On appeal to the Ohio Supreme Court, in a five-two decision, the judgment of the Court of Appeals was reversed and the case remanded to the trial court for further proceedings. In reversing, the Ohio Supreme Court held that:

> "*Bendix Autolite Corp. v. Midwesco Enterprises, Inc.* (1988), 486 U.S. 888, 108 S. Ct. 2218, 100 L. Ed.2d 896, may not be retroactively applied to bar claims in state courts which had accrued prior to the announcement of that decision." (Section 16, Article I, Ohio Constitution, applied).

Pet. App. A1.

In support of its decision, the majority advanced two positions. First, the majority stated that:

> "If *Chevron* remains good law today, then that case—and not *Harper*—provides the proper test to apply to the present case."

Pet. App. A5.

Second, the majority declared that:

> "Even if the *Chevron* test has been replaced by *Harper*, the retroactive application of *Bendix* remains impermissible."

Pet. App. A6.

As to the perceived scope of *Harper v. Virginia Dept. of Taxation*, the majority stated:

> "*Harper* allows state courts to tailor their own remedies as they determine the manner in which a Supreme Court opinion is to be retroactively applied."

Pet. App. A7, and

"... when there is a conflict between a state constitutional civil right and a federal rule of decision that is not rooted in the United States Constitution, such as retroactivity, the state civil right prevails."

Pet. App. A8. With regard to the reference to remedy found in *Harper v. Virginia Dept. of Taxation*, the remedy adopted by the majority was to simply ignore *Bendix Autolite Corp. v. Midwesco Enterprises, Inc.* As stated by the majority:

"The Ohio Constitution prohibits us from applying *Bendix* to those claims already accrued when that decision was announced by the United States Supreme Court. If we were to retroactively apply the holding in *Bendix*, we would extinguish the claims of injured persons who had justifiably relied on R.C. 2305.15, because of a subsequent determination by the United States Supreme Court that they could not have foreseen. Such an application would clearly violate the rights of Ohioans to obtain a meaningful opportunity to bring their claims in Ohio's courts. The retroactive application of *Bendix* would violate the rights afforded by Section 16, Article I of the Ohio Constitution, which provides in part:

'All courts shall be open, and every person, for an injury done him in his land, goods, person, or reputation, shall have remedy by due course of law, and shall have justice administered without denial or delay.' "

Pet. App. A7.

Two justices dissented. In addressing the issue for review, *i.e.*, whether the decision in *Bendix Autolite Corp. v. Midwesco Enterprises, Inc.* applies retroactively to bar Carol L. Hyde's personal injury claim, the dissenters noted the following:

"The majority states in Part I of its opinion that the *Bendix* decision cannot be given retroactive effect under the three-pronged test set forth in *Chevron Oil Co. v. Huson* (1971), 404 U.S. 97, 92 S.Ct. 349, 30 L.Ed.2d 296. But the majority also recognizes that the test from *Chevron* may have been replaced by a new rule of retroactivity in *Harper v. Virginia Dept. of Taxation* (1993), 509 U.S. _____, 113 S.Ct. 2510, 125 L.Ed.2d 74."

Pet. App. A10.

"What is absent from the majority's opinion is *any* discussion of the United States Supreme Court opinions which unequivocally state that the retroactivity of constitutional decisions by the United States Supreme Court is purely a matter of federal law. At least three recent opinions make this point clear. Justice O'Connor stated in the court's plurality opinion in *Am. Trucking Assns., Inc. v. Smith, supra*, 496 U.S. at 177, 110 S.Ct. at 2330, 110 L.Ed.2d at 159, that '[t]he determination whether a constitutional decision of this Court is retroactive—that is, whether the decision applies to conduct or events that occurred before the date of decision—*is a matter of federal law.*' " (Emphasis added).

Pet. App. A12.

"The Ohio Constitution cannot be used, as the majority does today, to revive this unconstitutional statute; that is, our state constitution cannot be used to accomplish what the Commerce Clause forbids. In a word, should the Supreme Court grant review we invite peremptory reversal."

Pet. App. A16.

> "The United States Supreme Court has held that the retroactivity of federal constitutional decisions is a matter of federal law, and its holding in this regard is binding on the states under the Supremacy Clause. We are therefore obligated to apply the federal rules of retroactivity to the case before us, and the rule from *Harper* requires us to give retroactive effect to the *Bendix* decision. The majority disregards federal law and holds that *Bendix* may not be retroactively applied. Because I believe that we are not constitutionally permitted to do so, I respectfully dissent."

Pet. App. A16.

A Motion for Rehearing filed on February 18, 1994 was denied by the Ohio Supreme Court on April 6, 1994.

SUMMARY OF ARGUMENT

The issue for decision in the Ohio Supreme Court was whether this Court's ruling in *Bendix Autolite Corp. v. Midwesco Enterprises, Inc.* would be retroactively applied to the filing of Respondent's Complaint. In rejecting the retrospective application of *Bendix Autolite Corp. v. Midwesco Enterprises, Inc.*, the majority advanced two propositions of law.

First, the majority stated that:

> "If *Chevron* remains good law today, then that case—[*Chevron*] and not *Harper*—provides the proper test to apply to the present case."

Pet. App. A5.

To the extent that the majority relied upon *Chevron Oil Co. v. Huson* in the context of a choice of law, its reliance was misplaced in light of the clear directives contained in *James B. Beam Distilling Co. v. Georgia* and *Harper v. Virginia Dept. of Taxation.* Likewise, to the extent that the majority utilized *Chevron Oil Co. v. Huson* to create a remedy, its reliance was equally misplaced. As stated by the dissent:

> "No one has suggested, however, that the states use the remedy issue as a way to avoid application of the retroactivity rule from *Harper* . . ."

Pet. App. A12.

The majority's reliance upon *Chevron Oil Co. v. Huson,* in light of *Harper v. Virginia Dept. of Taxation,* was obviously in the context of a remedy analysis. While it is submitted that remedy is not an appropriate issue for review, the retroactive

applicability of judicial decisions being the rule and not the exception, even if *Chevron Oil Co. v. Huson* is applied herein the majority did not conduct a complete *Chevron Oil Co. v. Huson* analysis. In commenting upon the majority's resort to *Chevron Oil Co. v. Huson*, the dissent stated that:

> "The majority actually makes no serious effort to apply this test. The majority's effort is limited to a three-sentence analysis of prong one and a one-sentence dismissal of the remaining two prongs, concluding that this case and the *Chevron* case are so factually similar that any discussion of the remainder of the test is unnecessary. It appears from this casual treatment of the test from *Chevron* that the majority intends for its decision to rest entirely upon the state grounds announced in Part II of its opinion."

Pet. App. A10.

As to the first prong of any *Chevron Oil Co. v. Huson* analysis, *i.e.*, does the decision represent a "clear break" with past law, the majority failed to comment upon the fact that the U.S. District Court for the Northern District of Ohio, Western Division, three days after Respondent's accident, and the U. S. Court of Appeals for the Sixth Circuit, two months before Respondent filed her suit, both found O.R.C. §2305.15 to be unconstitutional. Likewise, decisions of this Court and other courts had foreshadowed the ruling in *Bendix Autolite Corp. v. Midwesco Enterprises, Inc.*

With respect to prongs two and three of the *Chevron Oil Co. v. Huson* analysis, the majority never examined either. The majority's only comment as to either prong was that:

> "Because of the factual similarities between the present case and *Chevron*, it is unnecessary to discuss the other two prongs of the *Chevron* test."

Pet. App. A6.

When critically examined, it is clear that the facts and issues present in *Chevron Oil Co. v. Huson* are not those contained herein.

Whatever reliance the majority placed upon *Chevron Oil Co. v. Huson, i.e.,* whether as a choice of law or remedy, it is clear that the majority's reliance was misplaced. Whether as a choice of law or remedy, *Chevron Oil Co. v. Huson* is not controlling herein.

Aside from any *Chevron Oil Co. v. Huson* analysis, the majority sought further justification for its decision to reject the retrospective application of *Bendix Autolite Corp. v. Midwesco Enterprises, Inc.* by stating that:

> "*Harper* allows state courts to tailor their own remedies as they determine the manner in which a Supreme Court opinion is to be retroactively applied."

Pet. App. A7, and

> ". . . when there is a conflict between a state constitutional civil right and a federal rule of decision that is not rooted in the United States Constitution, such as retroactivity, the state civil right prevails."

Pet. App. A8.

Neither pronouncement of the majority is a correct statement of the law nor did either pronouncement address the dissent's poignant comment that:

"... our state constitution cannot be used to accomplish what the Commerce Clause forbids."

Pet. App. A16.

The Supremacy Clause to the U. S. Constitution does not allow the federal retroactivity doctrine to be supplanted by the invocation of a contrary approach to retroactivity under state law. O.R.C. §2305.15 is unconstitutional and *James B. Beam Distilling Co. v. Georgia* and *Harper v. Virginia Dept. of Taxation* require that *Bendix Autolite Corp. v. Midwesco Enterprises, Inc.* be given full retroactive effect in all cases still open on direct review and to all events, regardless of whether such events predate or postdate the announcement in *Bendix Autolite Corp. v. Midwesco Enterprises, Inc.*

ARGUMENT

I. The Ohio Supreme Court, In Refusing To Retroactively Apply The Decision In *Bendix Autolite Corp. v. Midwesco Enterprises, Inc.*, 486 U.S. 888, 108 S.Ct. 2218, 100 L.Ed.2d 896 (1988), To Civil Cases Pending At The Time *Bendix Autolite Corp. v. Midwesco Enterprises, Inc.* Was Announced, May Not Premise Its Actions On *Chevron Oil Co. v. Huson*.

In support of its decision, the majority stated:

"If *Chevron* remains good law today, then that case—[*Chevron*] and not *Harper*—provides the proper test to apply to the present case."

Pet. App. A5.

The majority's phraseology that "If *Chevron* remains good law today..." is telling. Since *James B. Beam Distilling Co. v. Georgia* and *Harper v. Virginia Dept. of Taxation*, the continued utility of employing a *Chevron Oil Co. v. Huson* analysis has been subject to considerable legal commentary. See Tereasa A. Dondlinger, Note, *Retroactivity And The Remains of Chevron Oil After Harper v. Virginia Dept. Of Taxation*, 45 Tax Law 455 (1993); Eric Rakowski, *Harper And Its Aftermath*, 1 Fla. Tax Rev. 455 (1993). While *James B. Beam Distilling Co. v. Georgia* and *Harper v. Virginia Dept. of Taxation* cast serious doubt on the continued use of *Chevron Oil Co. v. Huson*, it is clear that the majority of the Ohio Supreme Court nevertheless relied upon *Chevron Oil Co. v. Huson* in rejecting the retroactive application of *Bendix Autolite Corp. v. Midwesco Enterprises, Inc.*

In *Bendix Autolite Corp. v. Midwesco Enterprises, Inc.*, this Court held that Ohio's tolling statute, O.R.C. §2305.15(A), violated the Commerce

Clause to the U.S. Constitution in that it imposed an impermissible burden on interstate commerce. Furthermore, the Court refused to consider the request of Bendix to apply the Court's ruling prospectively and not to the parties in the case.

In affirming the grant of summary judgment in favor of Midwesco, the *Bendix Autolite Corp. v. Midwesco Enterprises, Inc.* Court stated:

> "Although statute of limitations defenses are not a fundamental right, Chase Securities Corp. v. Donaldson, 325 US 304, 314, 89 L Ed 1628, 65 S Ct 1137 (1945), it is obvious that they are an integral part of the legal system and are relied upon to project the liabilities of persons and corporations active in the commercial sphere. The State may not withdraw such defenses on conditions repugnant to the Commerce Clause. Where a State denies ordinary legal defenses or like privileges to out-of-state persons or corporations engaged in commerce, the state law will be reviewed under the Commerce Clause to determine whether the denial is discriminatory on its face or an impermissible burden on commerce. The State may not condition the exercise of the defense on the waiver or relinquishment of rights that the foreign corporation would otherwise retain. Cf. Dahnke-Walker Milling Co. v. Bondurant, 257 US 282, 66 L Ed 239, 42 S Ct 106 (1921); Allenberg Cotton Co. v. Pittman, 419 US 20, 42 L Ed 2d 195, 95 S Ct 260 (1974)."

100 L.Ed.2d at 903.

In the instant case, the Ohio Supreme Court did not question the unconstitutionality of O.R.C. §2305.15(A). The issue confronting the Ohio Supreme Court, however, was whether *Bendix Autolite Corp. v. Midwesco Enterprises, Inc.* should be applied retroactively. In rejecting the retroactive application of *Bendix Autolite Corp. v. Midwesco Enterprises, Inc.*, the Ohio Supreme Court initially resorted to a *Chevron Oil Co. v. Huson* analysis.

The Ohio Supreme Court's continued reliance upon *Chevron Oil Co. v. Huson* is misplaced in light of *James B. Beam Distilling Co. v. Georgia* and *Harper v. Virginia Dept. of Taxation.* Although *James B. Beam Distilling Co. v. Georgia* did not produce a unified opinion, the majority of the Justices agreed that:

> ". . . when the Court has applied a rule of law to the litigants in one case it must do so with respect to all others not barred by procedural requirements or res judicata."

115 L.Ed.2d at 493.

The Court's holding in *James B. Beam Distilling Co. v. Georgia* promoted equality by limiting the possibility for disparate treatment of similarly situated litigants. As stated by Justice Souter:

> "Thus, the question is whether it is error to refuse to apply a rule of federal law retroactively after the case announcing the rule has already done so. We hold that it is, principles of equality and stare decisis here prevailing over any claim based on a *Chevron Oil* analysis."

115 L.Ed.2d at 491.

In his concurring opinion in *James B. Beam Distilling Co. v. Georgia*, with whom Justice Marshall and Justice Blackmun concurred, Justice Scalia, in urging a complete abrogation of any *Chevron Oil Co. v. Huson* inquiry, stated:

"If the division of federal powers central to the constitutional scheme is to succeed in its objective, it seems to me that the fundamental nature of those powers must be preserved as that nature was understood when the Constitution was enacted. The Executive, for example, in addition to 'tak[ing] Care that the Laws be faithfully executed,' Art II, §3, has no power to bind private conduct in areas not specifically committed to his control by Constitution or statute; such a perception of '[t]he Executive power' may be familiar to other legal systems, but is alien to our own. So also, I think, '[t]he judicial Power of the United States' conferred upon this Court and such inferior courts as Congress may establish, Art III, §1, must be deemed to be the judicial power as understood by our common-law tradition. That is the power 'to say what the law is,' *Marbury v. Madison*, 1 Cranch 137, 177, 2 L.Ed.60 (1803), not the power to change it. I am not so naive (nor do I think our forebears were) as to be unaware that judges in a real sense 'make' law. But they make it *as judges make* it, which is to say *as though* they were 'finding' it—discerning what the law *is*, rather than decreeing what it is today *changed to*, or what it will *tomorrow* be. Of course this mode of action poses 'difficulties of a . . . practical sort,' ante, at—, 115 L.Ed.2d, at 488, when courts decide to overrule prior precedent. But those difficulties are one of the understood checks upon judicial law making; to eliminate them is to render courts substantially more free to 'make new law,' and thus to alter in a fundamental way the assigned balance of responsibility and power among the three Branches.

"For this reason, and not reasons of equity, I would find both 'selective prospectivity' and 'pure prospectivity' beyond our power."

115 L.Ed.2d at 497.

Justice Blackmun, in commenting upon the concept of prospective application of new decisional rules stated:

"We fulfill our judicial responsibility by requiring retroactive application of each new rule we announce. . . Like Justice Scalia, I conclude that prospectivity, whether 'selective' or 'pure' breaches our obligation to discharge our constitutional function."

115 L.Ed.2d at 496.

Since the ruling in *James B. Beam Distilling Co. v. Georgia*, other courts have applied retroactivity without consideration of a *Chevron Oil Co. v. Huson* analysis. *Muller v. Custom Distributors, Inc.*, 487 N.W.2d 1 (1992); *Bottineau Farmers Elevator v. Woodward-Clyde*, 963 F.2d 1064 (8th Cir. 1992); *Boudrea v. Deloitte, Haskins & Sells*, 942 F.2d 497 (8th Cir. 1991) (per curiam); *Welch v. Cadre Capital*, 946 F.2d 185 (*Welch II*) (2d Cir. 1991), *on remand* from, 111 S. Ct. 2882 (1991).

In *Muller v. Custom Distributors, Inc.*, the Court stated that:

"Because of our resolution of this case, we need not analyze this case under the *Chevron* factors."

487 N.W.2d at 6. The issues present in *Muller v. Custom Distributors, Inc.* were essentially the same issues presented in the instant case, *i.e.*, a savings statute, a late filing of a Complaint, a request to apply *Bendix Autolite Corp. v. Midwesco Enterprises, Inc.* and a potential *Chevron Oil Co. v. Huson* analysis.

The logic enunciated in *James B. Beam Distilling Co. v. Georgia* was given greater clarity in *Harper v. Virginia Dept. of Taxation* when Justice Thomas stated:

> "Beam controls this case, and we accordingly adopt a rule that fairly reflects the position of a majority of Justices in Beam: When this Court applies a rule of federal law to the parties before it, that rule is the controlling interpretation of federal law and must be given full retroactive effect in all cases still open on direct review and as to all events, regardless of whether such events predate or postdate our announcement of the rule. This rule extends Griffith's ban against 'selective application of new rules.' 479 US, at 323, 93 L Ed 2d 649, 107 S Ct. 708. Mindful of the 'basic norms of constitutional adjudication' that animated our view of retroactivity in the criminal context, id., at 322, 93 L Ed 2d 649, 107 S Ct 708, we now prohibit the erection of selective temporal barriers to the application of federal law in noncriminal cases. In both civil and criminal cases, we can scarcely permit 'the substantive law [to] shift and spring' according to 'the particular equities of [individual parties'] claims' of actual reliance on an old rule and of harm from a retroactive application of the new rule. Beam, supra, at _____, 115 L Ed 2d 481, 111 S Ct 2439 (opinion of Souter, J.). Our approach to retroactivity heeds the admonition that '[t]he Court has no more constitutional authority in civil cases than in criminal cases to disregard current law or to treat similarly situated litigants differently.' American Trucking, supra, at 214, 110 L Ed 2d 148, 110 S Ct 2323 (Stevens, J., dissenting)."

125 L.Ed.2d 86.

As to the applicability of *Chevron Oil Co. v. Huson,* Justice Thomas stated:

> "We need not debate whether Chevron Oil represents a true 'choice-of-law principle' or merely 'a remedial principle for the exercise of equitable discretion by federal courts.' *American Trucking Assns., Inc. v Smith,* 496 US 167, 220, 110 L Ed 2d 148, 110 S Ct 2323 (1990) (Stevens, J., dissenting). Compare id., at 191-197, 110 L Ed 2d 148, 110 S Ct 2323 (plurality opinion) (treating *Chevron Oil* as choice-of-law rule), with id., at 218-224, 110 L Ed 2d 148, 110 S Ct 2323 (Stevens, J., dissenting) (treating *Chevron Oil* as a remedial doctrine). Regardless of how *Chevron Oil* is characterized, our decision today makes it clear that 'the *Chevron Oil* test cannot determine the choice of law by relying on the equities of the particular case' and that the federal law applicable to a particular case does not turn on 'whether [litigants] actually relied on [an] old rule [or] how they would suffer from retroactive application' of a new one."

125 L.Ed.2d at FN9, pg. 85.

In *Harper v. Virginia Dept. of Taxation,* Justice Thomas went on to state:

> "Furthermore, the legal imperative 'to apply a rule of federal law retroactively after the case announcing the rule has already done so' must 'prevai[l] over any claim based on a Chevron Oil analysis.' Id., at _____, 115 L Ed 2d 481, 111 S Ct 2439 opinion of Souter, J.)."

125 L.Ed.2d at 87.

As a result of *Harper v. Virginia Dept. of Taxation,* it is clear that the *Chevron Oil Co. v. Huson* test cannot determine the choice of law by relying on

the equities of a particular case. Furthermore, it is equally clear that the federal law applicable to a particular case does not turn on whether litigants actually relied on an old rule or how they would suffer from retroactive application of a new rule. Last, any attempt to employ a *Chevron Oil Co. v. Huson* analysis must be rejected in light of the legal imperative to apply a rule of federal law retroactively after the case announcing the rule has already done so.

In most cases, the issue of retroactivity is not present. In other words, courts apply settled principles and precedents of law to the disputes that come before them. Where those principles and precedents antedate the events on which the dispute turns, the court merely applies legal rules already decided, and the litigant has no basis on which to claim exemption from those rules. It is only when the law changes in some respect that an assertion of nonretroactivity may be entertained, the general case arising when a court expressly overrules a precedent upon which the case would otherwise be decided differently and by which the parties may previously have regulated their conduct.

As noted in *James B. Beam Distilling Co. v. Georgia*, since the question is whether the Court should apply the old rule or the new rule, retroactivity is initially a matter of choice of law. The antecedent choice-of-law question is a federal one where the rule at issue derives from federal law, constitutional or otherwise. The issue in the instant case is a question of federal law, *i.e.*, whether the decision in *Bendix Autolite Corp. v. Midwesco Enterprises, Inc.* is controlling on the parties herein. Once a rule is found to apply backwards, there may be a further issue of

remedies, *i.e.*, whether the party prevailing under a new rule should obtain the same relief that would have been awarded if the rule had been an old one.

As discussed in *James B. Beam Distilling Co. v. Georgia*, there are three ways in which the choice-of-law issue may be resolved, those being full retroactivity, pure prospectivity and selective or modified prospectivity. Justice Souter discussed at length the three approaches in *James B. Beam Distilling Co. v. Georgia*. 115 L.Ed.2d at 488.

James B. Beam Distilling Co. v. Georgia was concerned with the question of selective prospectivity in the civil context. In rejecting said concept, the *James B. Beam Distilling Co. v. Georgia* Court stated:

> "Nor, finally, are litigants to be distinguished for choice-of-law purposes on the particular equities of their claims to prospectivity: whether they actually relied on the old rule and how they would suffer from retroactive application of the new. It is simply in the nature of precedent, as a necessary component of any system that aspires to fairness and equality, that the substantive law will not shift and spring on such a basis. To this extent, our decision here does limit the possible application of the Chevron Oil analysis, however irrelevant Chevron Oil may otherwise be to this case. Because the rejection of modified prospectivity precludes retroactive application of a new rule to some litigants when it is not applied to others, the Chevron Oil test cannot determine the choice of law by relying on the equities of the particular case."

115 L.Ed.2d 493. As a result of *James B. Beam Distilling Co. v. Ceorgia* and *Harper v. Virginia Dept. of Taxation*, it is clear that *Chevron Oil Co. v. Huson* cannot determine the choice of law by relying upon the equities of the particular case.

Although *James B. Beam Distilling Co. v. Georgia* and *Harper v. Virginia Dept. of Taxation* did not directly address the issue of pure prospectivity, Justice Scalia did in his concurring opinion in *James B. Beam Distilling Co. v. Georgia* wherein he advocated its rejection. See also Justice Blackmun's concurring opinion in *James B. Beam Distilling Co. v. Georgia*, at 115 L.Ed.2d t 496, where he also rejected the concept of pure prospectivity, and Frances X. Beytagh, *Ten Years Of Non-Retroactivity: A Critique and a Proposal*, 61 Va.L. Rev. 1557, 1612 (1975).

Just as *Chevron Oil Co. v. Huson* lacks viability in the context of a choice of law, it lacks equal viability in a discussion of remedy in the instant case. As correctly stated by the dissent:

> "It is indeed curious that a discussion of 'tailoring a remedy' has even surfaced in this case. After all, this case has not yet proceeded beyond the pleading stage. No trial has been held to determine whether liability exists at all, and a finding of liability must always precede any attempt to tailor a remedy. The court's discussion of a remedy in *Harper* arose only because the court had *already decided the liability issue.* Of course, that decision has not been made in this case."

Pet. App. A11.

> "No one has suggested, however, that states use the remedy issue as a way to avoid application of the retroactivity rule from *Harper*, which is precisely what the majority accomplishes with its ruling."

Pet. App. A12.

While it is clear from *James B. Beam Distilling Co. v. Georgia* and *Harper v. Virginia Dept. of Taxation* that full retroactivity is the normal rule in civil cases and that *Chevron Oil Co. v. Huson* has limited, if any, applicability, a *Chevron Oil Co. v. Huson* analysis of the facts of the instant case results in the same conclusion reached by the trial Court and Court of Appeals, that being the retroactive application of *Bendix Autolite Corp. v. Midwesco Enterprises, Inc.*

The majority of the Ohio Supreme Court in Part I of its opinion stated that *Bendix Autolite Corp. v. Midwesco Enterprises, Inc.* could not be given retroactive effect under the three-pronged test of *Chevron Oil Co. v. Huson.* In that *Chevron Oil Co. v. Huson* can no longer be used to determine choice-of-law, the majority's resort in *Chevron Oil Co. v. Huson* was therefore in the context of a remedy analysis. However, as noted in the dissent:

> "The majority actually makes no serious effort to apply this test. The majority's effort is limited to a three-sentence analysis of prong one and a one-sentence dismissal of the remaining two prongs, concluding that this case and the *Chevron* case are so factually similar that any discussion of the remainder of the test is unnecessary. It appears from this casual treatment of the test from *Chevron* that the majority intends for its decision to rest entirely upon the state grounds announced in Part II of its opinion."

Pet. App. A10.

The underlying issue in *Chevron Oil Co. v. Huson* was whether state or federal law determined the timeliness of the filing of Huson's complaint for

bodily injury. In 1968, an action was instituted in the U. S. District Court for the Eastern District of Louisiana to recover for personal injuries sustained approximately two years earlier by Huson while working on Chevron's artificial island drilling rig located on the Outer Continental Shelf off the Louisiana coast. Chevron did not question the timeliness of the action as a matter of laches under admiralty law, which at that time was held to be the applicable law under the Outer Continental Shelf Lands Act in a line of Court of Appeals' decisions.

However, in 1969, while the case was still pending trial, the United States Supreme Court's decision in *Rodriguez v. Aetna Casualty & Surety Co.*, 395 U.S. 352, 23 L.Ed.2d 360, 89 S.Ct. (1835), interpreted the Outer Continental Shelf Lands Act as making state law remedies, rather than admiralty law remedies, applicable to such accidents. Relying on the Supreme Court decision, the District Court held that the Louisiana one-year statute of limitations on personal injury actions governed and barred the instant action. On appeal, the Court of Appeals for the Fifth Circuit reversed and remanded, holding that the Louisiana statute of limitations, being "prescriptive" as barring the remedy but not extinguishing the right to recover, was not applicable under the *Rodriguez v. Aetna Casualty & Surety Co.* decision, and that the case was not barred by the controlling federal law as to the doctrine of laches.

Certiorari was granted by this Court to consider the construction offered by the Court of Appeals for the Fifth Circuit to the Outer Continental Shelf Lands Act and *Rodriguez v. Aetna Casualty & Surety Co.* Accordingly, when the facts and issues present in *Chevron Oil Co. v. Huson* and the instant case are compared, it can hardly be said that:

> "Because of the factual similarities between the present case and *Chevron*, it is unnecessary to discuss the other two prongs of the *Chevron* test."

Pet. App. A6.

The three issues to be considered in a *Chevron Oil Co. v. Huson* analysis are: 1) does the decision represent a "clear break" with past law; 2) would retroactive application further or retard operation of the new rule; and 3) could retroactive application produce substantial inequitable results. *Chevron Oil Co. v. Huson* at 106. Although the Ohio Supreme Court majority found these factors to balance in Respondent's favor, a review of recent authority addressing this question dictates to the contrary.

In *Crespo v. Stapf*, 608 A.2d 241 (1992), the New Jersey Supreme Court decided essentially the same issue and concluded that a *Chevron Oil Co. v. Huson* analysis dictated the retroactive application of *Bendix Autolite Corp. v. Midwesco Enterprises, Inc.*

In *Crespo v. Stapf*, the question of the retroactive application of *Bendix Autolite Corp. v. Midwesco Enterprises, Inc.* arose in the first instance simultaneously with a challenge to the constitutionality of the New Jersey statute. The latter question is not present herein. Because both elements were present in *Crespo v. Stapf*, the *Crespo v. Stapf* Court concluded that it was still appropriate to conduct a *Chevron Oil Co. v. Huson* analysis of the retroactive issue.

If a complete *Chevron Oil Co. v. Huson* analysis is undertaken in the instant case, the result will be the same as reached by the *Crespo v. Stapf* Court, the trial

Court and the Court of Appeals, that being the retroactive application of *Bendix Autolite Corp. v. Midwesco Enterprises, Inc.* The first factor in any *Chevron Oil Co. v. Huson* analysis asks whether the litigants and those similarly situated *reasonably* relied upon the settled law in ordering their affairs. In the instant case, the question is whether Respondent was justified in relying upon Ohio's tolling statute, O.R.C. §2305.15(A), in waiting over three and one-half years to file suit against Petitioners.

In addressing the first element of the *Chevron Oil Co. v. Huson* analysis, the *Crespo v. Stapf* Court stated:

> "Long before the statute of limitations ran on Crespo's claim, decisions of this Court and of the United States Supreme Court had foreshadowed our decision that the tolling provisions violate the Commerce Clause. Although litigants may rely on the presumed validity of a statute, *Salorio v. Glaser*, 93 *N.J.* 447, 465, 461 A.2d 1100, *cert. denied*, 464 *U.S.* 993, 104 *S.Ct.* 486, 78 *L.Ed.*2d 683 (1983), several opinions had undermined the application of the statute to individual defendants. Ten years ago the United States Supreme Court in *G.D. Searle v. Cohn, supra*, 455 *U.S.* at 413-14, 102 *S.Ct.* at 1144, 71 *L.Ed.*2d at 258-59, first indicated that the tolling statute might run afoul of the Commerce Clause. In that case, the Court affirmed our holding in *Velmohos* that the statute did not violate the Equal Protection Clause, but remanded consideration of the commerce clause issue to the Third Circuit Court of Appeals. *Thus, when plaintiff's cause of action accrued on March 30, 1983, the United States Supreme Court had already questioned the continuing validity of the statute under the Commerce Clause.*" (Emphasis Supplied).

608 A.2d at 250, 251.

Much like other states, the constitutionality of the Ohio tolling statute was at issue before Respondent's accident of March 5, 1984. On March 8, 1984, three days after Respondent's motor vehicle accident, the U. S. District Court for the Northern District of Ohio, Western Division, in *Copley v. Heil-Quaker*, Case No. C-82-512, (R. 44-54), held that the provisions of O.R.C. §2305.15 were unconstitutional because they violated the Commerce Clause. (R-50). In *Copley v. Heil-Quaker*, Bendix Corp., the same litigant in *Bendix Autolite Corp. v. Midwesco Enterprises, Inc.* was permitted to file an *amicus curiae* brief opposing Heil-Quaker's motion to dismiss.

Copley v. Heil-Quaker arose out of a gas explosion that occurred on December 12, 1975. The Copley's Complaint, filed on August 24, 1982, alleged that in 1967 the Copleys had purchased a furnace manufactured by Heil-Quaker that was installed in their home. Heil-Quaker, a Delaware corporation having its principal place of business in Tennessee, was neither licensed to do business in Ohio nor had it ever appointed an agent for service of process upon it in Ohio.

As noted by the U. S. District Court:

> "Clearly, the plaintiff's claims against Heil-Quaker were too late when this action was filed on August 24, 1982 and would be barred without the effect of the Ohio savings clause, O.R.C. §2305.15. That section provides in pertinent part:
>
> > 'When a cause of action accrues against a person, if he is out of state, or has absconded, or conceals himself, the period of limitation for the commencement of the action as provided in sections 2305.04 to 2305.14

> inclusive . . . does not begin to run until he comes in to the state or while he is so absconded or concealed . . .'
>
> "This provision has been construed to toll limitations when the defendant, including a corporate defendant, is not amenable to personal service of process within the borders of the State of Ohio, even though continuously amenable to 'long-arm' service outside the state. *Seeley v. Expert, Ind.*, 26 Ohio St.3d 61, 269 N.E.2d 121 (1971); *Ohio Brass Company v. Allied Products Corporation*, 339 F. Supp. 417 (N.D. Ohio 1972). Heil-Quaker argues that §2305.15, as construed in Ohio and applied to a corporation in the position of Heil-Quaker violates the Due Process Clause of the Fourteenth Amendment and the Commerce Clause."

(R. at 46).

In holding that O.R.C. §2305.15 was unconstitutional, the U. S. District Court went on to state:

> "This Court agrees with analysis of the *Coons* court and the court in *McKinley*. Regardless of whether the provisions of O.R.C. §2305.15 are analyzed under a *per se* test or a balancing test, this provision, as applied to defendant Heil-Quaker, violates the Commerce Clause. Under the *per se* test this provision violates the Commerce Clause by forcing interstate corporations to obtain a license in order to obtain the benefit of the statute of limitations defense. Under the balancing test, the burden of having to obtain a license and therefore waiving a possible defense of lack of personal jurisdiction outweighs the benefits to potential litigants of making service of process easier to obtain on corporations engaged

> solely in interstate commerce. *The Court therefore finds that the provisions of O.R.C. §2305.15 are unconstitutional, as applied to defendant Heil-Quaker, because they violate the Commerce Clause.*" (Emphasis supplied).

(R. at 50). *Coons v. American Honda Motor Co.*, 463 A.2d 921 (1983) pertained to New Jersey's tolling statute, N.J. Stat. §2A:14-22 (1984) whereas *McKinley v. Combustion Engineering, Inc.*, 575 F. Supp. 942 (1983) was concerned with Idaho's tolling statute, Idaho Code 30-509 (repealed 1979).

Clearly, as of March 8, 1984, the date *Copley v. Heil-Quaker* was decided, a clear challenge to the constitutionality of Ohio's tolling statute was in the words of the *Crespo v. Stapf* Court, ". . . in the Supreme Court's pipeline". 608 A.2d at 251. Further evidence of the ongoing constitutional "challenge" to O.R.C. §2305.15 is to be found in the opinion of the U.S. Court of Appeals for the Sixth Circuit in *Bendix Autolite Corp. v. Midwesco Enterprises, Inc.*, 820 F.2d 186 (1987), which was decided and filed on June 3, 1987, approximately two (2) months *before* Respondent filed her lawsuit against Petitioners.

The Court of Appeals in *Bendix Autolite Corp. v. Midwesco Enterprises, Inc.* affirmed the ruling of the U. S. District Court which held that Ohio's tolling statute imposed an impermissible burden on interstate commerce and thus was unconstitutional. As stated by the U. S. Court of Appeals for the Sixth Circuit:

> "We agree with the district court that the reasoning of *Coons* and *McKinley* should be applied to the case at hand. The Ohio tolling statute, like those of New Jersey and Idaho,

> places the foreign corporation in the . . . difficult position of having to choose between exposing itself to personal jurisdiction in [state] courts by complying with the tolling statute, or, by refusing to comply, to remain liable in perpetuity for all lawsuits containing state causes of action filed against it in [the state].
>
> "*McKinley*, 575 F.Supp. at 945. We find this burden placed on firms engaged exclusively in interstate commerce to be a *per se* violation of the commerce clause."

820 F.2d at 188. Again, using the words of the *Crespo v. Stapf* Court, the "challenge" to the constitutionality of Ohio's tolling statute had moved ever further as of June 3, 1987 ". . . in the Supreme Court's pipeline".

Actual knowledge of the unconstitutionality of O.R.C. §2305.15 on the part of Respondent was admitted in the Amicus Curiae Brief urging reversal that was filed in the Ohio Supreme Court by Brown & Szaller Co., L.P.A., where it was stated that:

> "It is also clear that neither Carol Hyde nor the Ohio Dalkon Shield victims had any reason to believe that the tolling statute would not continue to protect them from the running of the statute of limitations, *at least until June 3, 1987*, the date when the Sixth Circuit Court of Appeals decided *Bendix*." (Emphasis supplied).

Amicus Curiae Brief of Brown & Szaller Co., L.P.A., urging reversal, at 15.

The fact that Respondent did not file suit until August 11, 1987, over two (2) months after *Bendix Autolite Corp. v. Midwesco Enterprises, Inc.* was decided in the U. S. Court of Appeals, casts a fatal

blow to Respondent's argument of *reasonable reliance* upon the constitutionality of O.R.C. §2305.15. Clearly, as of June 3, 1987, Respondent and/or her counsel knew or should have known that the U. S. District Court for the Northern District of Ohio, Western Division, March 5, 1984, and the U. S. Court of Appeals for the Sixth Circuit, June 3, 1987, had declared Ohio's tolling statute to be unconstitutional. As such, there can be no realistic "justifiable reliance" upon a statute that has been declared unconstitutional. Without "justifiable reliance", there can be no vesting of rights.

In light of the ongoing constitutional challenges to tolling statutes, occurring both in Ohio, other state jurisdictions, the federal Courts and the U. S. Supreme Court, Respondent could not have reasonably relied upon O.R.C. §2305.15 when she filed her suit on August 11, 1987. As of August 11, 1987, both a U. S. District Court and a U. S. Court of Appeals had declared Ohio's tolling statute to be unconstitutional. See also *Juzwin v. Asbestos Corp. Ltd.*, 900 F. 2d 686 (3rd Cir., 1990) for another *Chevron Oil Co. v. Huson* analysis that concluded with the retroactive application of *Bendix Autolite Corp. v. Midwesco Enterprises, Inc.*

The second *Chevron Oil Co. v. Huson* factor requires the Court to ". . . weigh the merits and demerits in each case by looking to the prior history of the rule in question, its purpose and effect." *Chevron Oil Co. v. Huson, supra*, at 106-107. Stated another way, will the purpose of the rule be advanced by retroactive application. The trial Court, Court of Appeals and the *Crespo v. Stapf* Court all found that retroactive application would advance the new rule.

With regard to rule advancement, the reasoning of the *Crespo v. Stapf* Court has equal applicability herein. As stated in *Crespo v. Stapf*:

> "The purpose of our ruling is to prevent New Jersey from burdening interstate commerce by discriminating against nonresident defendants. The failure to give retroactive effect to our finding of unconstitutionality of the statute would deprive nonresident individual defendants, such as Stapf, of the repose to which they are entitled from the running of the period of limitations. Retroactive application of our decision would eliminate discrimination against nonresident individual defendants, ensure equal treatment of all individual defendants, and conform with the Legislature's apparent recognition of the unconstitutionality of the tolling provision."

608 A.2d at 251-252.

In discussing the second prong of the *Chevron Oil Co. v. Huson* test, the Court in *Juzwin v. Asbestos Corp. Ltd.* voiced concerns that have equal applicability to the instant case when it stated that:

> "The effect of our ruling is to ensure that, like New Jersey corporations, foreign corporations that at all times are amenable to service of process under the long-arm rule have the benefit of the state's statutes of limitations. Implementation of our decision will bring New Jersey law into conformity with the rule in the majority of states; that amenability to process by long-arm service renders a tolling statute inapplicable. To give our ruling only prospective effect would retard the purpose of the rule by allowing an entire class of plaintiffs to pursue

> claims against foreign corporations that the statute of limitations would bar against New Jersey corporations. Thus, we conclude that the second factor favors retroactivity as well."

900 F.2d at 900.

Retroactive application will not retard the purpose and effect of Ohio's tolling statute. Ohio cannot justify its tolling statute when the Ohio long-arm statute would permit service of process on foreign corporations and persons throughout the period of limitations. The intent of the tolling statute was clearly not to force foreign corporations and persons to remain liable in perpetuity for all lawsuits containing state causes of action filed against them in Ohio.

To find anything but retroactivity, would be to deprive Petitioners of the repose to which they are constitutionally entitled from the running of the statute of limitations. The retroactive application of *Bendix Autolite Corp. v. Midwesco Enterprises, Inc.* eliminates discrimination against nonresident defendants, ensures equal treatment of all defendants and brings Ohio into conformity with the majority rule.

The final *Chevron Oil Co. v. Huson* factor is whether retroactive application would produce inequitable results and adversely affect the administration of justice. *Chevron Oil Co. v. Huson*, at 106. The third factor intertwines with the first factor's focus on reasonable reliance. As stated in *Crespo v. Stapf:*

> "If a plaintiff could have reasonably relied on the tolling provision, retroactive nonrecognition of that provision would be inequitable. *Juzwin*,

supra, 900 F.2d at 696. For reasons previously stated, Crespo and Piermont could not reasonably have relied on the tolling provision. *Supra* at 368-371, 608 A.2d at 250, 251. Nothing in the record indicates that after the accident Stapf was not all times amenable to long-arm jurisdiction. Stapf contends, and Piermont does not refute, that his identity, address, and telephone number were known immediately after the accident and were available to Crespo or his attorney both before and after the accident. Indeed, when Crespo filed suit, he had no problem in serving Stapf. To bar Crespo's claim against Stapf because of Crespo's own failure or that of his attorney to bring a timely action is neither inequitable nor unfair."

608 A.2d at 252.

In the instant case, Respondent had no *reasonable basis* to rely upon O.R.C. §2305.15 in light of the prior rulings in *Copley v. Heil-Quaker* and *Bendix Autolite Corp. v. Midwesco Enterprises, Inc.*, March 8, 1984, and June 3, 1987, respectively, declaring Ohio's tolling statute to be unconstitutional, when she filed her lawsuit on August 11, 1987. As noted by the trial court:

> "If there was evidence that either of the defendants in this case had absconded, or concealed themselves for the purpose of avoiding process, or were otherwise not amenable to service of process, then the legitimate purposes of the tolling statute would be served by denying them the benefit of the statute of limitations. Both defendants remained at all times subject to jurisdiction under the long arm statutes, R.C. §2307.381, *et seq.* Civ. R. 4.3 provides the method for out-of-state service of process."

Pet. App. A33.

At all times herein, the identities and addresses of Petitioners were known to Respondent. When suit was filed on August 11, 1987, service of process was made upon Petitioners at the same addresses that were available on March 5, 1984. To bar Respondent's claim against Petitioners because of Respondent's own failure or that of her counsel to bring a timely action is neither inequitable nor unfair.

As to the final prong of *Chevron Oil Co. v. Huson* substantial inequitable results, what was applicable in *Crespo v. Stapf* may have equal applicability herein. In *Crespo v. Stapf*, the retroactive application of *Bendix Autolite Corp. v. Midwesco Enterprises, Inc.* did not leave Crespo without a remedy. That remedy was a malpractice action. In commenting upon the latter course of action, the *Crespo v. Stapf* court stated:

> "Finally, the dissent incorrectly posits that the equities compel prospective application of our decision. It reaches this conclusion because Crespo is remitted to a legal malpractice action, in which he must prove not merely that Stapf's product was defective, but also that Piermont erred. *Post* at 375, 608 A.2d at 254. Missing from the dissent's calculus are the rights of the defendant, Stapf, arising from the expiration of the statute of limitations. Those rights, as the United States Supreme Court has declared, "are an integral part of the legal system * * *." *Bendix Autolite, supra*, 486 *U.S.* at 893, 108 *S.Ct.* at 2221, 100 *L.Ed*2d at 903. According to the Court, a prospective application may be appropriate when a plaintiff "could not have known the time limitation that the law imposed on him." *Chevron Oil, supra*, 404 *U.S.*, at 108, 92 *S.Ct.* at 355, 30 *L.Ed.* 2d at 306-07. Here, however,

> Crespo should have known that *N.J.S.A.* SA:14-22 could not constitutionally toll the running of the statute of limitations on his claim against Stapf. In sum, the equities do not favor prospective application of our decision."

608 A.2d at 253. At a minimum, Petitioners should be afforded the same rights that Stapf was provided in *Crespo v. Stapf.*

II. The Refusal Of The Ohio Supreme Court To Retroactively Apply The Decision In *Bendix Autolite Corp. v. Midwesco Enterprises, Inc.* Is Neither Authorized By *Harper v. Virginia Dept. Of Taxation* Nor Is It In Conformity With The Supremacy Clause Of The United States Constitution Which Prohibits The Federal Retroactivity Doctrine To Be Supplanted By The Invocation Of A Contrary Approach To Retroactivity Under State Law.

In *Davis v. Michigan Department of Treasury,* (1989), 489 U.S. 803, 109 S.Ct. 1500, 103 L.Ed.2d 891, this Court ruled that states may not tax the pensions of former federal workers without imposing a like tax on the retirement income of former state employees. Noting that Michigan had agreed to refund the state income taxes Paul Davis had paid on his federal pension over the years in controversy, the Court stated that he was entitled to a refund. It then remanded the case to allow the Michigan courts and state lawmakers to determine how state and federal retirees were to be treated equally in the future—both taxed according to the same schedule or exempted from tax—and to resolve the refund claims of federal pensioners that had been or might be filed.

Davis v. Michigan Department of Treasury left no doubt that the states must equalize the taxation of federal and state retirees. However, *Davis v. Michigan Department of Treasury* did not address the question whether states owed some form of retroactive relief to all similarly situated federal retirees who had paid higher taxes than had state pensioners.

Virginia was one of the many states affected by the ruling in *Davis v. Michigan Department of Treasury.* In *Harper v. Virginia Dept. of Taxation,* 401 S.E.2d 868 (1991), the Virginia Supreme Court concluded that *Davis v. Michigan Department of Treasury* established a requirement of equal treatment solely for the future. Accordingly, the Virginia Supreme Court refused to order refunds to federal retirees or to impose a retroactive tax on state pensions to secure equality.

In *Harper v. Virginia Dept. of Taxation,* this Court held that *Davis v. Michigan Department of the Treasury* applied retroactively to invalidate all state taxation schemes similar to Michigan's. *Harper v. Virginia Dept. of Taxation* also prescribed a general rule that required the Court's decisions to be applied retroactively. The rule of law announced in *Harper v. Virginia Dept. of Taxation* is clear and to the point. As stated by Justice Thomas:

> "*Beam* controls this case, and we accordingly adopt a rule that fairly reflects the position of a majority of Justices in *Beam: When this Court applies a rule of federal law to the parties before it, that rule is the controlling interpretation of federal law and must be given full retroactive effect in all cases still open on direct review and as*

to all events, regardless of whether such events predate or postdate our announcement of the rule. This rule extends *Griffith's* ban against 'selective application of new rules.' 479 US, at 323, 93 L Ed 2d 649, 107 S Ct. 708. Mindful of the 'basic norms of constitutional adjudication' that animated our view of retroactivity in the criminal context, id., at 322, 93 L Ed 2d 649, 107 S Ct 708, we now prohibit the erection of selective temporal barriers to the application of federal law in noncriminal cases. In both civil and criminal cases, we can acarcely permit 'the substantive law [to] shift and spring' according to 'the particular equities of [individual parties'] claims' of actual reliance on an old rule and of harm from a retroactive application of the new rule. *Beam, supra,* at _____, 115 L Ed 2d 481, 111 S Ct 2439 (opinion of Souter, J.). Our approach to retroactivity heeds the admonition that '[t]he Court has no more constitutional authority in civil cases than in criminal cases to disregard current law or to treat similarly situated litigants differently.' *American Trucking, supra,* at 214, 110 L Ed 2d 148, 110 S Ct 2323 (Stevens, J., dissenting)." (Emphasis supplied).

125 L.Ed.2d at 86.

Bendix Autolite Corp. v. Midwesco Enterprises, Inc. was decided on the basis of a violation of the Commerce Clause to the U. S. Constitution, clearly an issue involving federal law. Decisions of the United States Supreme Court are final and authoritative declarations of federal law and are binding on lower federal courts as well as the state courts. *South Carolina v. Bailey,* 289 U.S. 412, 77 L.Ed. 1292, 53 S.Ct. 667 (1933); *Henry v. Rock Hill,* 376 U.S. 776, 12 L.Ed.2d 79, 84 S.Ct. 1042 (1964).

As noted in *Rivers v. Roadway Express,* 511 U.S. _____, 128 L.Ed.2d 274, 114 S.Ct. _____ (1994):

> "It is this Court's responsibility to say what a statute means, and once the Court has spoken, it is the duty of other courts to respect that understanding of the governing rule of law. A judicial construction of a statute is an authoritative statement of what the statute meant before as well as after the decision of the case giving rise to that construction.[12]"

128 L.Ed.2d at 289.

In refusing to directly apply the rule of law announced in *Bendix Autolite Corp. v. Midwesco Enterprises, Inc.* to the parties herein, the majority attempted to justify its actions by stating:

> "The *Harper* court went on to note that a state, when retroactively applying a Supreme Court decision, 'retains flexibility' in fashioning appropriate relief."

Pet. App. A7.

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[12] "[7c, 9b] When Congress enacts a new statute, it has the power to decide when the statute will become effective. The new statute may govern from the date of enactment, from a specified future date, or even from an expressly announced earlier date. But when this Court construes a statute, it is explaining its understanding of what the statute has meant continuously since the date when it became law. In statutory cases the Court has no authority to depart from the congressional command setting the effective date of a law that it has enacted. Thus, it is not accurate to say that the Court's decision in *Patterson* 'changed' the law that previously prevailed in the Sixth Circuit when this case was filed. Rather, given the structure of our judicial system, the *Patterson* opinion finally decided what § 1981 had *always* meant and explained why the Courts of Appeals had misinterpreted the will of the enacting Congress."

The "relief" fashioned by the majority is clearly not the tax remedy referred to in *Harper v. Virginia Dept. of Taxation* or *McKesson v. Division of Alc. Bev.*, 496 U.S. 18, 110 L.Ed.2d 17, 110 S.Ct. 2238 (1990). Likewise, it is not resort to *any form* of a *Chevron Oil Co. v. Huson* test in that the majority was quite clear in its statement that:

> "Even if the *Chevron* test has been replaced by *Harper*, the retroactive application of *Bendix* remains impermissible."

Pet. App. A6.

To the contrary, it is the wrongful validation of an unconstitutional statute under the guise of "... fashioning appropriate relief". As noted by the Court in *Harper v. Virginia Dept. of Taxation*:

> "The constitutional sufficiency of any remedy thus turns (at least initially) on whether Virginia law 'provide[s] a[n] [adequate] form of 'predeprivation process,' for example, by authorizing taxpayers to bring suit to enjoin imposition of a tax prior to its payment, or by allowing taxpayers to withhold payment and then interpose their objections as defenses in a tax enforcement proceeding.' *McKesson*, 496 US, at 36-37, 110 L Ed 2d 17, 110 S Ct 2238. Because this issue has not been properly presented, we leave to Virginia courts this question of state law and the performance of other tasks pertaining to the crafting of any appropriate remedy. Virginia 'is free to choose which form of relief it will provide, so long as that relief satisfies the minimum federal requirements we have outlined.' *Id.*, at 51-52, 110 L Ed 2d 17, 110 S Ct 2238. State law may provide relief beyond the demands of federal due process, id., at 52, n 36, 110 L Ed 2d

> 17, 110 S Ct 2238, but under no circumstances may it confine petitioners to a lesser remedy, see id., at 44-51, 110 L Ed 2d 17, 110 S Ct 2238."

125 L.Ed.2d at 89.

The statute of limitations issue present in the instant case is far different from the tax question discussed in *Harper v. Virginia Dept. of Taxation*. Furthermore, whereas *Harper v. Virginia Dept. of Taxation* was a fully adjudicated case, the instant case has not proceeded beyond the pleading stage. As noted by the dissent:

> "No trial has been held to determine whether liability exists at all, and a finding of liability must always precede any attempt to tailor a remedy. The court's discussion of a remedy in *Harper* arose only because the court had *already decided the liability issue.* Of course, that decision has not been made in this case."

Pet. App. A11.

On the same day *James B. Beam Distilling Co. v. Georgia* was decided, the Court decided *Lampf, Pleva, Lipkind, Prupis and Pettigrow v. Gilbertson*, 501 U.S. _____, 115 L.Ed.2d 321, 111 S.Ct. _____ (1991), wherein a statute of limitations decision was applied retroactively without employing a *Chevron Oil Co. v. Huson* analysis or consideration of any equitable factors. The retroactive handling of the statute of limitations question was commented upon by Justice O'Connor in her dissent when she stated:

> "This Court has, on several occasions, announced new statute of limitations. Until today, however, the Court has *never* applied a new limitations period retroactively to the very case in which it announced the new rule so as to bar an action that was timely under binding Circuit precedent."

115 L.Ed. 23 at 341.

The Court's treatment of the retroactivity question in *Lampf, Pleva, Lipkind, Prupis and Pettigrow v. Gilbertson* was neither cursory nor an oversight. See Justice O'Connor's dissent in *Lampf, Pleva, Lipkind, Prupis and Pettigrow v. Gilbertson* at 115 L.Ed.2d 343. To the contrary, it was in line with the logic and reasoning set forth in *James B. Beam Distilling Co. v. Georgia* which was further clarified in *Harper v. Virginia Dept. of Taxation.*

As stated in *Rivers v. Roadway Express*:

> "Even though applicable Sixth Court precedents were otherwise when this dispute arose, the District Court properly applied *Patterson* to this case. See *Harper v. Virginia Dept. of Taxation*, 509 US _____, _____, 125 L Ed 2d 74, 113 S Ct 2510 (1993) ('When this Court applies a rule of federal law to the parties before it, that rule is the controlling interpretation of federal law and must be given full retroactive effect in all cases still open on direct review and as to all events, regardless of whether such events predate or postdate the announcement of the rule'). See also *Kuhn v. Fairmont Coal Co.*, 215 US 349, 372, 54 L Ed 228, 30 S Ct 140 (1910) ('Judicial decisions have had retrospective operation for near a thousand years') (Holmes, J., dissenting). The essence of judicial decisionmaking—applying general rules to particular situations—necessarily involves some peril to individual expectations because it is often difficult to predict the precise application of a general rule until it has been distilled in the crucible of litigation. See L. Fuller, Morality of Law 56 (1964) ('No system of law—whether it be judge-made or legislatively enacted—can be so perfectly drafted as to leave no room for dispute')."

128 L.Ed.2d at 288.

Just as *Griffith v. Kentucky*, 479 U.S. 314, 107 S.Ct. 708, 93 L.Ed.2d 649 (1987), eliminated limits on retroactivity in the criminal context by overruling *Linkletter v. Walker*, 381 U.S. 618, 85 S.Ct. 1731, 14 L.Ed. 601 (1965), *James B. Beam Distilling Co. v. Georgia* and *Harper v. Virginia Dept. of Taxation* have achieved the same result in the civil arena. Today, there should be no impediments standing in the way that a rule of federal law, once announced and applied to the parties to the controversy, must be given full retroactive effect by all Courts adjudicating federal law.

The majority in the instant case has chosen to ignore the rule set forth in *Harper v. Virginia Dept. of Taxation* thus creating an impediment to the retroactive application of *Bendix Autolite Corp. v. Midwesco Enterprises, Inc.* in Ohio. The impediment erected by the majority related to its erroneous interpretation of the statement contained in *Harper v. Virginia Dept. of Taxation* that:

> ". . . allows state courts to tailor their own remedies as they determine the manner in which a Supreme Court opinion is to be retroactively applied."

Pet. App. A7.

"Tailoring" in the instant case resulted in the rejection of the federal rule of law announced in *Bendix Autolite Corp. v. Midwesco Enterprises, Inc.* in favor of the generalities of Section 16, Article I of the Ohio Constitution. In refusing to retroactively apply *Bendix Autolite Corp. v. Midwesco Enterprises, Inc.*, the majority failed to consider the Supremacy Clause of the U. S. Constitution which provides that:

> "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."

Pet. App. A4.

As stated by Justice Thomas in *Harper v. Virginia Dept. of Taxation*:

> "The Supremacy Clause. US Const, Art VI, cl 2, does not allow federal retroactivity doctrine to be supplanted by the invocation of a contrary approach to retroactivity under state law. Whatever freedom state courts may enjoy to limit the retroactive operation of their own interpretations of state law, see *Great Northern R. Co. v. Sunburst Oil & Refining Co.*, 287 US 358, 364-366, 77 L Ed 360, 53 S Ct 145, 85 ALR 254 (1932), cannot extend to their interpretations of federal law. See *National Mines Corp. v. Caryl*, 497 US 922, 923, 111 L Ed 2d 740, 110 S Ct 3205 (1990) (per curiam); *Ashland Oil, Inc. v. Caryl*, 497 US 916, 917, 111 L Ed 2d 734, 110 S Ct 3202 (1990) (per curiam)."

125 L.Ed. 2d at 88.

Justice Thomas went on to state in *Harper v. Virginia Dept. of Taxation* that:

> "... we now prohibit the erection of selective temporal barriers to the application of federal law in noncriminal cases."

125 L.Ed.2d at 86.

What the majority accomplished herein is what Justice Thomas decried in *Harper v. Virginia Dept. of Taxation*, that being the erection of a selective temporal barrier to the application of the federal rule of law announced in *Bendix Autolite Corp. v. Midwesco Enterprises, Inc.* The barrier erected by the majority was Section 16, Article I of the Ohio Constitution. As declared by the majority:

> "The Ohio Constitution prohibits us from applying *Bendix* to those claims already accrued when that decision was announced by the United States Supreme Court."

Pet. App. A7.

The clear error of the majority was pointed out by the dissent:

> "However stated, it is clear that federal law controls the issue before us. The majority cites *no* authority for its assertion in Part II of its opinion that a conflict between a state constitutional civil right and a federal rule of decision that is not rooted in the United States Constitution must be resolved in favor of the state civil right. Commentators who have examined the issue would disagree. The federal rule of retroactivity—called a federal rule of decision by the majority—is not, as the majority correctly points out, rooted in the Constitution. See *Solem v. Stumes* (1984), 465 U.S. 638, 642, 104 S.Ct. 1338, 1341, 79 L.Ed.2d 579, 586 ('retroactive application [of judicial decisions] is not compelled, constitutionally or otherwise'). Instead it may be described as a federal common-law rule. See Field, Sources of Law: The Scope of Federal Common Law (1986), 99 Harv.L.Rev. 883, 890 (defining 'federal common law' as 'any rule of federal law created by a court * * * when the substance of

that rule is not clearly suggested by federal enactments—constitutional or congressional' [emphasis deleted]). Regardless of its origin, however, federal common law is still 'law' within the meaning of the Supremacy Clause and is binding on state court judges. *Id.* at 897 and fn. 64. For this reason, and because the statements by the Supreme Court in the abovementioned cases [*Am. Trucking Assns., Inc. v. Smith,* (1990), 496 U.S. 167, 110 S. Ct. 2323, 110 L.Ed.2d 148; *Ashland Oil, Inc. v. Caryl,* (1990), 497 U.S. 916, 110 S. Ct. 3202, 111 L.Ed.2d 734; *Harper v. Virginia Dept. of Taxation*] directly contradict the majority's assertion, I believe that in this case we cannot apply a state rule of retroactivity. We are bound by the Supremacy Clause of the United States Constitution to apply federal law, even if we believe the application of state law would produce a more palatable result." (Emphasis Supplied).

Pet. App. A13.

The Supremacy Clause to the U. S. Constitution does not allow the federal retroactivity doctrine to be supplanted by the invocation of a contrary approach to retroactivity under state law. O.R.C. §2305.15 is unconstitutional and *James B. Beam Distilling Co. v. Georgia* and *Harper v. Virginia Dept. of Taxation* require that *Bendix Autolite Corp. v. Midwesco Enterprises, Inc.* be given full retroactive effect in all cases still open on direct review and to all events, regardless of whether such events predate or postdate the announcement of *Bendix Autolite Corp. v. Midwesco Enterprises, Inc.*

CONCLUSION

For the reasons advanced herein, Petitioners, Reynoldsville Casket Co. and John M. Blosh, respectfully request this Court to reverse the decision of the Ohio Supreme Court and to enter final judgment in favor of Petitioners, Reynoldsville Casket Co. and John M. Blosh.

Respectfully submitted,

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